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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

Ismael Alfaro
Petitioner/Appellant

v.
Michael MUKASEY
ATTORNEY GENERAL OF THE UNITED STATES AND
David Still,
Acting District Director, San Francisco Office, U.S. IMMIGRATION AND NATURALIZATION SERVICE
Respondent.

REQUEST FOR DECLARATORY JUDGMENT REGARDING PETITIONER'S *PRIMA FACIE* ELIGIBILITY FOR US CITIZENSHIP {Hernandez de Anderson v. Mukasey, 497 F.3d. 927, 933 (9th Cir. 2007)

Prefatory Statement

This is an immigration case with an extremely long and involved procedural and legal history.

However, the precise issue can be distilled into a single question – is the Petitioner *prima facie* eligible to apply for

United States citizenship even though he is currently in Removal proceedings?

I. The Parties

The Petitioner is a Lawful Permanent Resident of the United States and he has been so for nearly forty years, having been granted Residency in 1969.(Exhibit A)

He is currently in Removal Proceedings based on a 1979 conviction under California Penal Code 264.1. (Exhibit A)

The Respondent is the Attorney General of the United States. He has delegated authority over the conduct of "Removal Hearings" to the Office of the District Counsel in San Francisco, CA.

II. Jurisdiction

Jurisdiction lies under the umbrella authority of the Declaratory Judgment Act, 28 U.S.C. 2201 (a).

Indeed, the Ninth Circuit has specifically held that this is the proper procedural avenue for any similarly situated alien.

When and alien is "Removal Proceedings" and he wishes to apply for Citizenship, the Government must affirmatively communicate to the Judge that the Respondent is prima facie eligible or the alien needs to obtain a Declaratory Judgment from a District Court. De Hernandez, supra at 933, quoting Matter of Cruz, 15 I& N Dec. 236 (BIA 1975).

III. VENUE

Venue is proper insofar as the Petitioner's case is currently with the Executive Office for Immigration Review (Office of the Immigration Judge) in San Francisco, CA.

PROCEDURAL HISTORY

I. ELOY IMMIGRATION COURT AND ARIZONA DISTRICT COURT HEARINGS

The Respondent is an "arriving alien" in proceedings brought on January 12, 2004 in Eloy, AZ. (Exhibit A)

His former counsel filed a Motion to Terminate proceedings based on his prima facie eligibility for Naturalization. (Exhibit B)

The matter was set for Master Hearing and the Petitioner's counsel Steve Coughlin, who resides in San Francisco, instructed local counsel to appear for him and to simply set a date for a hearing where the Motion to terminate would be meaningfully addressed.

In addition to his own testimony, Respondent contemplated that his Lawful permanent Resident wife would testify as well as his United States citizen children.

Instead, counsel was told simply that the Motion was denied - no hearing, no explanation and no meaningful appeal record. (Exhibit C)

The transcript reveals that there was no hearing at all on the Motion to Terminate. (Exhibit C)

Indeed, there is not even an on-the-record colloquy between the parties as to the relative merits of the Motion.

In the decision the Immigration Judge simply states that, "having considered all of the evidence before it, is denying the Motion to Terminate." (Exhibit D)

The Respondent, through current counsel, then filed a Writ of Habeas Corpus in the Phoenix District Court. (Exhibit E)

Respondent made two separate claims, one, (not relevant here) was that he was unconstitutionally deprived of his liberty by virtue of his being held in Mandatory Custody as an "arriving alien" and secondly, that he was denied due process of law when the Immigration Judge failed to conduct a hearing or meaningfully consider any evidence pursuant to the Petitioner's Motion to Terminate Removal proceedings to apply for United States Citizenship.

A. PETITIONER WAS DENIED DUE PROCESS OF LAW BY THE IJ IN ELOY, AZ

It is one of the anomalies of Immigration law that one can be eligible for citizenship on the one hand and ineligible for any relief on the other.

The only avenue for relief for a long time Resident is found at INA 240A (a) which requires seven years residency, however, the alien must "not have been convicted of an aggravated felony."

Next, while it is true that he committed the offense **twenty-one years** before the effective date of IIRAIRA, the law is retroactively applied.

This is so because while it is true that the Supreme Court has held that IIRAIRA cannot be apply retroactively to an alien who **pleads** guilty prior to the effective date of the Act, it does not apply to an alien like Respondent who proceeded to a jury trial. Armendiaz-Montaya v. Sonchik, 291 F.3d. 1116, 1121-1122 (9th Cir. 2002)

It was thus clear that the Petitioner's only avenue for relief was the Motion to terminate proceedings and he was denied due process in the Immigration Judge's refusal to even ***conduct*** a hearing or explain or justify his summary denial.

i. Legal standard for the denial of due process

It has been unambiguously held that aliens in deportation proceedings are entitled to both substantive and procedural due process right under our constitution. Reno v. Flores, 507 U.S. 292, 306 (1993). "It is well established that the Fifth Amendment entitles aliens to due process of law in deportation hearings."

It has also been held that the due process is offended where the Immigration Service, ignores its own precedent and ignores specific statutory grounds. Brownell v. We Shung 352 U.S. 180 (1956); Kwong Hai Chew v. Colding, 344 U.S. 590, 596 (1953).

Next, in the specific context of a Deportation/Removal hearing, due process demands that an alien facing deportation is entitled to a full and fair hearing of his claims and a reasonable opportunity to present evidence on his behalf. Sanchez v. INS, 164 F.3d. 448, 450 (9th Cir. 1990); Colemenar v. INS 210 F. 3d. 967, 975 (9th Cir. 200)

In the particular case, it was piercingly obvious that the Respondent was denied due process in the sense that he received ***no hearing at all*** and he had **no opportunity** to present evidence on his behalf.

Next, it was abundantly clear that the Petitioner had a right to **meaningful** administrative review to the Board of Immigration Appeals.

However, it was argued that that Respondent had been denied the right to meaningful appellate review because both counsel and the BIA are left to speculate as to ***why*** the Motion was denied.

Was it because, the IJ felt that the crime was so heinous that the intervening 25 years of law abidance did not purge the taint?

Was it because Petitioner had not presented sufficient hardship to his Lawful Resident wife and United States citizen children?

Was it because he did not credit the letters of support from his priest, his employer and his friends and neighbors?

II. **REAL ID was enacted and the case was transferred to the 9th Circuit and they agreed that a denial of due process had been found.**

REAL ID was enacted while this issue was still under consideration before the District Court.

Real ID divested the District Court of habeas jurisdiction and the matter was transferred to the 9th Circuit. (Exhibit F)

The 9th Circuit found that a denial of due process existed and the matter was remanded with specific instruction to conduct a

thoroughgoing and meaningful evidentiary hearing on the Motion to Terminate. (Exhibit G)

Next, the parties agreed to a stipulated remand that held that the Petitioner was entitled to a hearing on the Motion to Terminate. (Exhibit H)

III. **THE SAN FRANCISCO IMMIGRATION COURT HEARINGS.**

The Matter is now before the Immigration Judge in San Francisco and Counsel submitted a pleading entitled "Procedural History and Overview of the Issues and Renewed Motion to Terminate." (Exhibit I)

The Government responded with an Oppostion that, with all due respect, seriously misapprehends the legal distinction between *prima facie* eligibility and discretion. (Exhibit J)

Petitioner filed a Response to the Government Opposition. (Exhibit K)

On May, 1, 2008, the Immigration Judge responded with a one page ruling stating that, "There is no evidence of any communication by DHS that the Respondent is prima facie eligible for Naturalization." (Exhibit L)

The matter is set for Hearing on May 1, 2008 and if the Immigration Judge's order stands, the Petitioner is ineligible for any relief from Removal. (Exhibit M)

POINTS AND AUTHORITIES IN TERMS OF CITIZENSHIP ELIGIBILITY FOR AN ALIEN IN PROCEEDINGS.

The procedure to terminate proceedings is explicitly authorized by the regulations and allows an Immigration Judge to terminate proceedings under 8 C.F.R. 239.2 (f) which specifically allows the IJ to:

> "terminate removal proceedings to permit the respondent to proceed to a final hearing on a pending application or petition for naturalization, when he/she has established prima facie eligibility for naturalization and the matter involves exceptionally appealing or humanitarian factors."

Next, in terms of prima face eligibility, it is undisputed that, in terms of 101 (a) (f) (8,) and the applicability of an aggravated felony serving as a permanent bat to a bar to finding good moral character, prior to IMMACT90, the only bar to a finding of good moral character was a conviction for murder.

However, IMMACT90 specifically addressed the effective date of aggravated felonies in terms of the bar to a finding of good moral character under 101 (a)(f)(8) and held that this bar only applies to convictions on or after the effective date - November 29, 1990.

The Ninth Circuit has definitely checked in and held that the aggravated felonies added by IIRAIRA, in terms of good moral character, still have an effective date of November 29, 1990. Hernandez de Anderson v. Mukasey, 497 F.3d. 927 (9th Cir. 2007);Lopez-Castellanos v. Gonzalez 437 F.3D. 848, 851 (9th Cir. 2006)

As was explained above, there is a highly technical component to the prima face finding when an alien is in proceedings - the Government must affirmatively communicate to the Judge that the Respondent is prima facie eligible or the alien needs to obtain a Declaratory Judgment from a District Court. De Hernandez, supra at 933, quoting Matter of Cruz, 15 I& N Dec. 236 (BIA 1975).

Now, in the instant case, it is not a reasonable or intellectually responsible argument to claim that he is **not** prima facie eligible insofar as one is not statutorily precluded from demonstrating good moral character in the context of Citizenship if the conviction occurred before 1990 where, as here, the alien was convicted in ***1979*** - eleven years before the cut-off.

However, it is argued that the Government **has** affirmatively communicated prima facie eligibility for relief in the sense that the US Attorney **stipulated** and agreed to have the case remanded for an Evidentiary hearing on the Motion to Terminate.

In any event, if it is not found that the Government has affirmatively agreed to prima facie eligibility, then we would

ask this Court to simply render a Declaratory Judgment stating that the Petitioner is prima facie eligible for Naturalization.

PRAYER FOR RELIEF

Petitioner therefore respectfully asks this court to render a Judgment stating,

1. By virtue of the stipulated Remand signed by the US Attorney, the San Francisco Office of the District Counsel is estopped from asserting that they oppose the prima facie finding of eligibility for Naturalization;
2. In the alternative, we would ask the Court to render a Judgment stating that the Petitioner is *prima facie* eligible for Citizenship based on the date of the conviction in this case. This ruling is silent as to the favorable exercise of discretion; it merely declares that the Petitioner is prima facie eligible to apply for US Citizenship.

Dated: 4/25 2008

Frank P. Sprouls

EXHIBIT

A

U.S. Department of Justice
Immigration and Naturalization Service

Notice to Appear

In removal proceedings under section 240 of the Immigration and Nationality Act

File No: A19 168 626

In the Matter of:

Respondent: ALFARO ALFARO, ISMAEL

2257 CULPEPPER STREET, NAPA, CA. 94558 (Number, street, city, state and ZIP code)

707) 254 - 7129 (Area code and phone number)

☒ 1. You are an arriving alien.
☐ 2. You are an alien present in the United States who has not been admitted or paroled.
☐ 3. You have been admitted to the United States, but are deportable for the reasons stated below.

The Service alleges that you:

1. You are not a citizen or national of the United States of America.
2. you are a native and a citizen of Mexico.
3. You were granted Legal Permanent Resident Status in the United States of America on or about February 20, 1969.
4. You were convicted in violation of California Penal Code - 261 (2)/ 264.1 - Forcible rape - a felony, in the Superior Court of California, County of Napa on or about August 03, 1979.
5. You applied for admission at Oakland International Airport on or about December 15, 2003.
6. You were paroled for Deferred Inspection on or about December 15, 2003.
7. Your parole was revoked on or about January 12, 2004.

On the basis of the foregoing, it is charged that you are subject to removal from the United States pursuant to the following provision(s) of law:

Section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act, as amended, in that you are an alien who has been convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime.

☐ This notice is being issued after an asylum officer has found that the respondent has demonstrated a credible fear of persecution.

☐ Section 235(b)(1) order was vacated pursuant to: ☐ 8 CFR 208.30(f)(2) ☐ 8 CFR 235.3(b)(5)(iv)

YOU ARE ORDERED to appear before an immigration judge of the United States Department of Justice at: To be scheduled

(Complete Address of Immigration Court, Including Room Number, if any)

on To be set (Date) at To be set (Time) to show why you should not be removed from the United States based on the charge(s) set forth above.

Bryan Vann, CBP Officer, SFR
(Signature and Title of Issuing Officer)

Date: 01/12/2004

SAN FRANCISCO, CALIFORNIA
(City and State)

See reverse for important information

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Form I-862 (Rev. 4-1-97) A

EXHIBIT B

GRUSSENDORF – COGHLAN, P.C.
615 Sansome Street 2nd floor
San Francisco, CA 94126

U.S. DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
ELOY, ARIZONA

In the Matter of	A19 168 626
ALFARO-ALFARO, Ismael	MOTION TO TERMINATE PROCEEDINGS
Respondent	

INTRODUCTION

Respondent Ismael Alfaro, by and through counsel, respectfully requests that this Court TERMINATE PROCEEDINGS, because Respondent is eligible to become a United States citizen and has filed an application Form N-400 for naturalization (see attached). Pursuant to 8 CFR Section 239.2(f) an immigration judge may terminate removal proceedings to permit the alien to proceed on a pending application for naturalization when the alien has established prima facie eligibility for naturalization. In the interests of judicial economy and in light of the strong equities in this case termination of proceedings is the most expedient remedy.

STATEMENT OF THE RELEVANT FACTS

Respondent is a citizen of Mexico, who became a lawful permanent resident of the U.S. in September 1969. He is the husband of a lawful permanent resident and the father of two U.S. citizen children.

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In a Notice to Appear dated January 12, 2004, Respondent is charged with having been convicted in 1979 of the offense of Forcible rape, in violation of California Penal Code Sections 262(2)/264.1. That offense arguably qualifies as an aggravated felony under Section 101(a)(43)(A) of the Immigration and Nationality Act. However, that conviction does not bar him from being able to show the requisite good moral character in order to qualify for naturalization. Anyone who has been convicted of an aggravated felony subsequent to the enactment of the Immigration Act of 1990 (IMMACT 90) is permanently barred from being able to show good moral character for naturalization purposes. However, an earlier conviction does not have the same effect of a permanent bar. Under 8 CFR 316.10, an applicant shall be found to lack good moral character for purposes of naturalization if s/he is "convicted of an aggravated felony as defined in section 101(a)(43) of the Act on or after November 29, 1990."

Respondent apparently only has one other arrest subsequent to the 1979 conviction, for a DUI-related offense approximately 11-12 years ago.

CONCLUSION

Based on the foregoing Respondent is clearly eligible for naturalization, and requests that proceedings be terminated without prejudice so that he may proceed with his application to become a United States citizen.

DATED: February 27th, 2004

Respectfully submitted,

Paul Grussendorf

Counsel for Respondent

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EXHIBIT C

Lapaglia?

MR. LAPAGLIA TO JUDGE

No, we'll let the Court do that.

JUDGE TO MR. LAPAGLIA

Well, the Court will direct Mexico. And the Court will -- let me make sure I've marked all the documents. Previously marked in, in as -- previously marked and admitted as Exhibit 1, which is Notice to Appear. The respondent was previously represented by a law firm in San Francisco. That firm submitted written pleadings of the respondent. The Court will mark those pleadings as Exhibit 2. Actually that is not a written pleadings, it's a request for a change of venue which the Department responded to and the Court ultimately denied. The next substantive exhibit is going to be the motion to terminate proceedings which the Court will mark and admit as Exhibit 2. The Court will mark and admit as Exhibit 3, the Department's response to the motion to terminate. And at this time, based on the evidence before it the admissions the concessions of the respondent and the current state of the law having -- and the Court will sustain the charge of removability under Section 212(a)(2)(A)(i)(I) and will order the respondent removable from the United States to Mexico on the charge contained in the Notice to Appear. Mr. Lapaglia, would you like to reserve appeal of the Court's decision?

MR. LAPAGLIA TO JUDGE

Yes, Your Honor.

JUDGE TO MR. LAPAGLIA

You going to be representing the respondent on appeal?

MR. LAPAGLIA TO JUDGE

No, Your Honor.

JUDGE TO MR. LAPAGLIA

Okay.

JUDGE TO MR. LAPAGLIA

Your Honor, I'd like to submit a motion to withdraw.

JUDGE TO MR. LAPAGLIA

All right. Well, let me finish the oral decision and we'll get to that.

JUDGE TO MR. ALFARO-ALFARO

Q. Now, Mr. Alfaro, how old are you today?

MR. LANDIS TO JUDGE

Sir, before you go on I do also have the (indiscernible) Department record. I have a response to our opposition motion to terminate.

MR. LANDIS TO JUDGE

Very well.

MR. LANDIS TO JUDGE

I don't, I don't know if the Court has --

JUDGE TO MR. LANDIS

I don't know, we'll double check. Thank you, Mr. Landis.

JUDGE TO MR. ALFARO-ALFARO

EXHIBIT D

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
Eloy, Arizona 85231

File No.: A 19 168 626 April 15, 2004

In the Matter of)
)
ISMAEL ALFARO-ALFARO) IN REMOVAL PROCEEDINGS
)
Respondent)

CHARGE: Section 212(a)(2)(A)(i)(I) - conviction of a crime involving moral turpitude.

APPLICATIONS: Motion to terminate.

ON BEHALF OF RESPONDENT:

Mr. Richard Lapaglia
Law offices of Richard Lapaglia
515 North Main Street
Eloy, AZ 85321

ON BEHALF OF DHS

Mr. Brent H. Landis, Esquire
Assistant Chief Counsel
1705 East Hanna Road
Eloy, AZ

ORAL DECISION AND ORDER OF THE IMMIGRATION JUDGE

The respondent is a 54-year-old male, native and citizen of Mexico. The United States Department of Homeland Security has brought these charges against the respondent pursuant to authority contained in the Immigration and Nationality Act. These proceedings were initiated with the filing of a Notice to Appear with the Immigration Court on or about the 16th of January, 2004. See Exhibit 1 herein.

In that document the Department of Homeland Security alleged that the respondent is not a citizen or national of the United States, that he is a native of Mexico and a citizen of Mexico. That he was granted legal permanent resident status in the United

States on or about the 20th of February, 1969. That he was convicted on or about the 3rd of August, 1979, in the Superior Court of California, Napa County for forcible rape in violation of California law. It further alleges the respondent applied for admission to the United States at Oakland International Airport on or about the 15th of December, 2003. It further alleged that he was paroled for deferred inspection on or about the 15th of December, 2003. And it finally alleged that his parole was revoked on or about the 12th of January, 2004.

Based on the factual allegations, the Department charged the respondent as removable under Section 212(a)(2)(A)(i)(I) of the Act, an alien who has been convicted of or who admits having committed a crime involving moral turpitude other than a purely political offense. The respondent admitted the factual allegations, conceded the charge of removability and the Court directed Mexico as the country of removal should removal become necessary, the respondent having expressed no fear of returning to Mexico should he be deported there.

The respondent, through counsel, moved to terminate these proceedings. That motion to terminate is found in this record as Exhibit 2. The request is for the Judge to terminate these removal proceedings to permit the respondent to proceed on a pending application for naturalization. The Department of Homeland Security responded to that motion to terminate. The Service's response is Exhibit 3. Again, there is a response from

the respondent's counsel. Exhibit 4 is the response to the DHS's opposition to the motion to terminate. And the Court, having considered all the evidence before it, is denying the motion to terminate in order for the respondent to file an application for naturalization. Further, the Court, on the record before it, is sustaining the charges based on the concessions and admissions of the respondent and on the information contained as an attachment to Exhibit 3. It shows the respondent was on the 3rd of August, 1979, convicted of forcible rape in violation of California Penal Code 261(2), as well as 264.1 which is forcible rape. It shows that he was convicted by a jury trial and that he was sentenced to five years in prison. There is a copy of the criminal information attached to that document as well.

The respondent is ineligible to apply for cancellation of removal for certain lawful permanent aliens because he has been convicted of an aggravated felony. He is ineligible to apply for an adjustment or readjustment of status because he has been convicted of an aggravated felony. He is ineligible for cancellation of removal for certain non-lawful permanent residents because he is a lawful permanent resident, that is ten-year cancellation. He is ineligible to apply for voluntary departure because of the aggravated felony conviction. In short, the Court is not aware of any relief that this respondent may be eligible. The Court will note that this is a 1979 conviction and that the respondent, had he pled to this offense, would be

eligible for relief under Section 212(c) pursuant to the United States Supreme Court decision in St. Cyr v. INS. However, the respondent was convicted by a jury trial and he is therefore ineligible for the requested relief under Section 212(c).

Further, the respondent makes a humanitarian argument as well. Counsel makes an argument that the Department of Homeland should be a stop from removing the respondent from the United States because of the age of this conviction and because of the fact the INS and its successor organization, the Department of Homeland Security, renewed the respondent's lawful permanent resident status. While that is an argument that has certain appeal, it is an argument that is beyond the scope of the jurisdiction of this Court, and one that needs to be pursued by the respondent in a Federal District Court.

The respondent being eligible for no forms of relief, the Court will order the respondent removed from the United States to Mexico on the charge contained in the Notice to Appear. The following order will be entered.

ORDER

IT IS HEREBY ORDERED that the respondent be removed from the United States to Mexico on the charge contained in the Notice to Appear.

JOHN W. DAVIS
United States Immigration Judge

EXHIBIT E

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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

PHOENIX DIVISION

Ismael Alfaro
Petitioner,

v. JOHN ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES AND
District Director,
Phoenix District Office, U.S. BUREAU OF CITIZENSHIP AND IMMIGRATION SERVICES
Respondent.

PETITION FOR A WRIT OF HABEAS CORPUS

CV04-1115-PHX-EJM-CRP

GENERAL ALLEGATIONS

Petitioner is a native and citizen of Mexico who was granted Lawful Residency in **1969**.

On or about 01/24/04 he was apprehended at entry following a brief trip to his native Mexico and placed in Removal proceedings by the Respondent based on a conviction in 1979,

following a jury trial, for a violation of CA Penal Code 261 (Rape). (Exhibit A - Notice to Appear, the INS charging document).

He received the lower term of five years. (Exhibit B)

The NTA refers to him as an "arriving alien" and as such the position of the Respondents is that he is ineligible for Bond.

Their position is **not** based on INA 236 (c) of the Illegal Immigration and Immigrant Responsibilty Act (IIRAIRA) which holds that nearly all criminal aliens are denied bond.

That statute was given the constitutional imprimatur of the Supreme Court in Kim v. De Moore, 38 US 123 (2003)

"But for" his apprehension at entry he would have been eligible for Bond based on the fact that his crime occurred well before the date of the enactment of IIRAIRA in 1996 an he did not come into custody directly from a Penal institution. He thus falls under what is called the Transitional Period Custody Rules. 303 (b) (2) of IIRAIRA.

Now the Transitional Rules, although expired, still apply to an alien who would have been eligible during the term of those Transitional Rules. Matter of West, Int. Dec. 3438 (BIA 2000); Matter of Adejini Int. Dec. 3417 (BIA 2001); Matter of Rojas, Int. Dec. 3451 (BIA 2001).

The TPCR rules construe 303 (b) (2) of IIRAIRA and the applicability of 236 (c) to aliens who are not directly remanded

into INS custody following a criminal sentence and, as in the instant matter, parties who have lived law abiding lives for many years then come into custody through non-criminal law means.

However, the Immigration Judge, acceding to the Respondents, has him held in a No-Bond status.

Next, as relief from Removal the Petitioner filed a "Motion to Terminate Removal Proceedings" so he could apply for Naturalization. (Exhibit C - Motion and receipt of Citizenship application).

The Government opposed the Motion. (Exhibit D)

This procedure is authorized by the regulations and allows an Immigration Judge to terminate proceedings under 8 C.F.R. 239.2 (f) which specifically allows the IJ to:

> "terminate removal proceedings to permit the respondent to proceed to a final hearing on a pending application or petition for naturalization, when he/she has established prima facie eligibility for naturalization and the matter involves exceptionally appealing or humanitarian factors."

There is nothing in the regulations which prevents a Respondent from filing an N-400 *subsequent* to the initiation of Removal proceedings.

This is clear when the regulatory scheme is read as a whole.

Indeed, the entire scheme is set up to allow an alien to overcome the bars to applying for citizenship when removal proceedings are extant and the matter presents exceptionally appealing or humanitarian factors.

Obviously, the reason 8 C.F. R. 292 et seq. requires proceedings to be terminated in cases of compelling equitable interest is because of the bar to applying for Citizenship while an alien is in proceedings found at INA section 318;8 USC 1429

If the IJ terminates proceedings specifically to apply for Citizenship, the bar does not apply and the Service must address the merits of the Naturalization application.

To further demonstrate that this proposed motion is authorized by the Act and the regulations, section 318, makes special reference to such procedure.-

> "Provided, that the findings of the Attorney General in terminating removal proceedings, or canceling the removal of an alien... shall not be in any way binding upon the Attorney General with respect to the question of whether such person has established his eligibility for naturalization as required by this title." INA 318.

It is apparent that the regulations allow an alien to file an application for Naturalization before the Service while in proceedings. This makes the petition "pending". The IJ then may exercise her discretion in terminating proceedings to remove the bar found at INA 318; 8 USC 1429

Based on the above, the IJ can terminate proceedings if the Court is satisfied that prima facie eligibility exists and the case presents exceptional and compelling matters.

Next, there is no question as to prima face eligibility based on the distant nature of the conviction.

Section 316{8 USC 1427} of the 1996 Act governs the standards required to demonstrate Good Moral Character in terms of eligibility for Naturalization.

In order to be eligible for Naturalization, an applicant must be a person of good moral character for the five years preceding the date the alien files the application for Naturalization.

This is a statutory predicate to eligibility and it is acknowledged that the Service can look beyond the one year period in making the ultimate determination on good moral character. INA 316 (e)

However, prior misconduct is only relevant if the Service has some indicia that the applicant is not presently a person of good moral character. Santamaria- Ames v. INS, 194 F.3d. 1127 (9th Cir. 1996).

Section 316 must be read in conjunction with 101 (f) (8) {8 USC 1101 (f) (8)} regarding good moral character.

> "no person shall be regarded as, or found to be, a person of good moral character who, during the period for which good moral character is required to be

> established is, or was...one who at any time, has been convicted of an aggravated felony as defined in subsection 101 (a) (43).

In terms of 101 (a) (f) (8,) and the applicability of criminal convictions as a bar to finding good moral character, prior to IMMACT90, the only bar to a finding of good moral character was a conviction for murder.

After IMMACT 90, the bar to a finding of good moral character added the laundry list of convictions found at 101 (a) (43) which IMMACT90 added to that section - drug trafficking, crimes or violence with a five year sentence and so on.

However, IMMACT90 specifically addressed the effective date of aggravated felonies in terms of the bar to a finding of good moral character under 101 (a)(f)(8) and held that this bar only applies to convictions on or after the effective date - November 29, 1990.

It is thus clear that Congress recognizes the significance of the temporal application of 101 (a)(f)(8) and if it wishes to alter that temporal application it must specifically and explicitly do so.

It is clear that none of the subsequent legislation, from AEDPA to IIRAIRA has made any explicit, textual change to IMMACT90's effective date for 101 (a)(f)(8) and one is precluded from a finding of good moral character for murder at any time and

any aggravated felony for a conviction entered on or after November 29, 1990.

There is no question that the Government agreed that the Petitioner was prima face eligible insofar as their opposition was based on his failure to demonstrate exceptional equities. (Exhibit D - Government opposition).

The petitioner responded to the Government opposition by presenting voluminous evidence regarding the equities that the petitioner has developed in the twenty five years that have elapsed since the conviction -

-25 years of law abidance;

-Lawful Resident mother and Lawful Resident spouse;

-Two United States citizen children described as exemplary students, with the 17 year old poised to attend college;

-Same employer since 1993;

- A deep and abiding faith as evidenced by a letter from his pastor;

-Strong support of the community as evidenced by multiple letter of support all of whom writ of his probity, work ethic and devotion to his family. (Exhibit E)

The matter was set for Master Hearing and the Petitioner's counsel Steve Coughlin, who resides in San Francisco, instructed local counsel to appear for him and to simply set a date for a hearing where the Motion to terminate would be meaningfully addressed.

In addition to his own testimony, Petitioner contemplated that his Lawful permanent Resident wife would testify as well as his United States citizen children.

Instead, counsel was told simply that the Motion was denied - No hearing, no explanation and no meaningful appeal record. (Exhibit F - declaration of counsel)

The IJ then determined that he was not eligible for relief and on April 15, 2004 Petitioner was ordered removed from the United States and present counsel filed an appeal to the Board of Immigration Appeals. (Exhibit G)

It is one of the anomalies of Immigration law that one can be eligible for citizenship on the one hand and ineligible for any relief on the other.

Here, it is conceded that the Respondent has been convicted of an aggravated felony as defined under the Act INA 101 (a) (43).

The only avenue for relief for a long time Resident is found at INA 240A (a) which requires seven years residency, however, the alien must "not have been convicted of an aggravated felony."

Next, while it is true that he committed the offense **twenty-one years** before the effective date of IIRAIRA, the law is retroactive as it applies to this Petitioner.

This is so because while it is true that the Supreme Court ahs held that IIRAIRA cannot be apply retroactively to an alien

who **pleads** guilty prior to the effective date of the Act, that holding obviously does not apply to an alien who proceeded to a jury trial. INS v. St Cyr, 533 U.S. 289.

It is thus clear the alien's only avenue for relief was the Motion to Terminate proceedings and he was denied due process in the Immigration Judge's refusal to even ***conduct*** a hearing or explain or justify his summary denial.

JURISDICTION

It is conceded that the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA) deprives petitioners who have been convicted of aggravated felonies of federal appellate review, however, this Court has jurisdiction pursuant to 28 U.S.C. 2241 to consider a writ of habeas corpus by an alien Petitioner who mounts a colorable constitutional challenge to the immigration laws and procedures of the United States. Flores-Miramontes v. INS, 212 F.2d. 1133, 1136 (9th Cir. 2000).

This Court has subject matter jurisdiction to consider this petition pursuant to 28 USC 2241. Magana-Pizano v. INS, 200 F.3D. 603(9th Cir 1999).

Magana Pazanao interpreted 28 USC 2241 in the context of the "court stripping" provisions of IRRAIRA.

Magana-Pizano found that this language divested the Federal appellate court from entertaining a constitutional challenge, such as this one, on direct appellate review.

However, the court found that IIRAIRA did not explicitly remove habeas jurisdiction from the district court and thus the district court retains jurisdiction under the all-writs section.

Furthermore, nearly every court that has addressed the issue has conceded that where a statute does not explicitly preclude constitutional review, it must be presumed that the district court retains jurisdiction to entertain a constitutional challenge under the all writ section. Magana-Pizano, supra; Danh v. de Moore, 59 F. Supp.2d 994, 998 (N.D. Cal. 1999). Vargas v. Reno, 966 F. Supp, 1537, 1541-1542 (S.D. Cal. 1997) Gonzalez v. Reno 144 F.3d. 110, 123 (1st Cir. 1998) Henderson V. Reno, 157 F.3d 106, 122 106, 122 (2nd Cir. 1988); Sandoval V. Reno, 166 F.3d 225, 238 (3rd Cir. 1999) La Guere v. Reno, 164 F.3d 1035 (7th Cir. 1998); Turkhan v. INS, 123 F.3d 487 (7th Cir. 1997);Mansour v. INS 123 F.2d. 423 (6th Cir. 1997);Auguste v. Attorney General, 118 F.3d. 723 (11th Cir. 1997) [LaGuerre v.Reno, 164 F.3d. 1035 (7th Cir. 1998) is the sole appellate court to hold that habeas jurisdiction is repealed by IIRAIRA].

Finally, there is no need to exhaust administrative remedies where the administrative remedies would be futile.

Here, as will be explained below, the claims presented in the instant writ are based on the Due Process and Equal Protection clauses of the constitution and it is undisputed that the BIA has no jurisdiction to entertain constitutional

questions of law. Matter of UM, 20 I&N Dec. 327 (Board of Immigration Appeals 1991)

PERSONAL JURISDICTION

A court has personal jurisdiction in a habeas case so long as the custodian can be reached by process. Braden v 30th Judicial Circuit Court of Kentucky, 410 U.S. 484, 499 Petitioner was convicted within the jurisdiction of this court.

All relevant hearings were held in Elroy, Arizona and the Immigration Judge in Elroy, Arizona ordered the Petitioner deported and he is being held in custody in Elroy, AZ.

POINTS AND AUTHORITIES AND ARGUMENT

I. PETITIONER WAS DENIED DUE PROCESS OF LAW BY THE IJ.

a. Legal standard for the denial of due process

It has been unambiguously held that aliens in deportation proceedings are entitled to both substantive and procedural due process right under our constitution. Reno V. Flores, 507 U.S. 292, 306, (1993). "It is well established that the Fifth Amendment entitles aliens to due process of law in deportation hearings."

This road has been traveled before and it has been held that even aliens unlawfully present in the United States are entitled to the protections of the Fifth Amendment. Doherty v Thornbough, 943 F.3d. 204, 209 (2d. Cir. 1991).

It would stand constitutional and immigration law principles on their head if illegal aliens were entitled to such protection but Lawful Permanent Residents of many years, with deep and enduring ties to this country, were not.

It has also been held that the due process is offended where the Immigration Service, ignores its own precedent and ignores specific statutory grounds. Brownell v. We Shung 352 U.S. 180 (1956); Kwong Hai Chew v. Colding, 344 U.S. 590, 596 (1953).

Next, in the specific context of a Deportation/Removal hearing, due process demands that an alien facing deportation is entitled to a full and fair hearing of his claims and a reasonable opportunity to present evidence on his behalf. Sanchez v. INS, 164 F.3d. 448, 450 (9th Cir. 1990); Colemenar v. INS 210 F. 3d. 967, 975 (9th Cir. 200)

In the particular case, it seems piercingly obvious that the Petitioner was denied due process in the sense that he received ***no hearing at all*** and he had **no opportunity** to present evidence on his behalf.

Next, it is abundantly clear that the Petitioner has a right to administrative review to the Board of Immigration Appeals.

However, the Petitioner here has been denied the right to meaningful appellate review because both counsel and the BIA are left to speculate as to ***why*** the Motion was denied.

Was it because, the IJ felt that the crime was so heinous that the intervening 25 years of law abidance did not purge the taint?

Was it because Petitioner had not presented sufficient hardship to his Lawful Resident wife and United States citizen children?

Was it because he did not credit the letters of support from his priest, his employer and his friends and neighbors?

In the instant case the alien was denied a hearing and a meaningful appeal and there has been a clear and demonstrable denial of due process and this Court should order the IJ to conduct a full and fair evidentiary hearing to allow the petitioner to testify as the facts and circumstances behind the conviction in **1979**, to allow him and his witnesses to testify as to his subsequent law abidance and the hardship they would suffer if he were to be removed from the United States.

II. **THE PETITIONER IS ENTITLED TO A REASONABLE BOND.**

1) INA 235 (b)- an alien who is an applicant for admission… shall be detained for a removal proceeding if an immigration officer determines that such alien is clearly and beyond doubt not entitled to be admitted….

"An Immigration Judge may not redetermine conditions of custody and bond determinations imposed by the Service for the following class of aliens…. (B) – arriving aliens in Removal proceedings. 8 C.F.R, 3.19 (h) (2) (i) (B).

As we pointed out above, but for the above authority, the Petitioner would be eligible for Bond under the Transitional Period Custody Rules. Matter of West, Int. Dec. 3438 (BIA 2000); Matter of Adejini Int. Dec. 3417 (BIA 2001); Matter of Rojas, Int. Dec. 3451 (BIA 2001).

Petitioner claims that the distinction between an "arriving alien" Lawful Resident and an Resident Alien present in the United States is outmoded and chimerical, is no longer relevant in terms of the amendments to Immigration law by virtue of the passage of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA) and it is also a violation of the Equal Protection Clause of the United States constitution, in terms of Residents, as being utterly irrational.

a. **THIS LAWFUL PERMANENT RESIDENT PETITIONER HAS A SUBSTANTIVE DUE PROCESS RIGHT TO BE FREE FROM ARBITRARY DETENTON.**

a. **Lawful Resident Arriving Aliens enjoy the protections of the Due Process clause of the Constitution based on IIRAIRA and the institution of the unitary procedure known as "Removal" proceedings.**

Now, section INA 236 governs custody determinations and the Supreme Court has held that this statute passes constitutional muter. Kim v. DeMoore, supra

However, as was pointed out above, the Petitioner does not fall under its purview.

Now, prior to Kim the majority of appellate courts had struck down the constitutionality of INA 236 and held that Lawful Residents were entitled to a Bond hearing.

Thus, when the District Courts addressed the issue, prior to Kim, when the law held that Resident aliens present in the United States were constitutionally entitled to Bond Hearing, they found that an arriving alien Resident *does* have an assert able liberty interest and an individualized bond determination should be conducted. Alaka v. Elwood, 225 F. Supp. 547 (United States District Court of Pennsylvania, E.D. October 8, 2002);Richardson v. Reno, 994 F. Supp. 1466 United States District Court S.D., Florida, 1998)

Now, to be sure, there has always been a distinction between arriving aliens who have ***never set foot upon*** our shores and an alien present in the United States.

"It is true those aliens who have passed through our gates, even illegally, may be expelled only after proceedings conforming to due process of law … but **an alien on the threshold on initial entry** stands on a different footing, whatever the procedure authorized by Congress it is the due process as far as the alien denied entry is concerned. U.S. ex rel Knaff v. Shaughnessy, 338 U.S. 537 (1950)

The Ninth Circuit upheld this distinction for "arriving' Mariel Cubans in Barrera-Echavarria v. Rison, 44 F.3d. 1441 (9th Cir. 1995).

Now, that case fell under prior law where the alien was in Exclusion Proceedings under (former) 8 USC 1226.

In any event, the Court found that the Non-Resident alien who ***had never been legally admitted*** to the United States could not assert a liberty interest and the Ninth Circuit overturned the District Court's grant of a writ of habeas corpus. Barrerra, supa.

As will be discussed below, all of the above cases fell under prior law where Immigration procedures had two sets of proceedings for aliens facing expulsion - Exclusion proceedings for aliens apprehended at the border under 8 UCS 1226 and aliens apprehended within the United States and Deportation proceedings under 8 UCS 1252b.

It will be argued below that the analysis must proceed under this new statutory framework, however, to the extent that the above law has relevance, it is totally inapplicable to the Petitioner because they all address an assertion of a liberty interest by an alien making an ***initial*** entry to the United States and this must be contrasted with a Lawful Permanent Resident of twenty years apprehended at entry after a brief trip and who is returning to his county of actual residence.

b. **IIRAIRA and the abolition of Exclusion proceedings alter the legal landscape.**

Among the many changes wrought by IIRAIRA, one of the most significant was the abolition of "Exclusion" proceedings and the institution of one unitary form of Proceedings - "Removal" under INA 240.

Under prior law, ***all*** aliens who sought to enter the United States were placed in Exclusion proceedings - if there was an issue as to the legal propriety of their "entry". INA 236 {8 USC 1226}

This included aliens entering the United States for the very first time as well as Lawful Residents of many years.

Under IIRAIRA proceedings are now brought in one unitary form - "Removal" under INA 240.

Now, the new Act retains some of the distinctions found under the old law in terms of Exclusion and Deportation in terms of ***certain*** arriving aliens receiving very limited constitutional and procedural protection.

For instance, non-Resident aliens who have never resided in the United States or who have resided in the United Sates for less than two years, or who have fraudulent documentation are subject to "expedited removal" by an INS Officer. INA 235 {8 USC 1225 (b) (1) et seq.}

Under this procedure, the alien has no right to see an Immigration Judge, no right to Bond and the Removal of the alien is not subject to administrative appellate review or judicial review. {8 USC 1225 (b) (1) (C)}

On the other hand, where an alien, like Petitioner, is not subject to expedited removal, he or she is then placed in "Removal" proceedings. {8 USC 1225 (b) (2) (A)}

Thus, Lawful Permanent Residents aliens apprehended at the border, who formerly would have been placed into Exclusion proceedings are now placed in Removal proceedings with all other aliens.

Now, unless this an Orwellian attempt to soften the harshness of the words "Deportation" and Exclusion" it must have legal significance.

Under prior law, an alien in Exclusion proceedings was specifically denied the opportunity seek Bond before the Immigration Judge, however he or she could request "parole" – a concept that would allow the alien to remain at liberty while the case was being adjudicated. (former INA 212 (d) (5) (A).

An alien denied Bond or parole was entitled to seek judicial review of the denial of parole. Jean v. Nelson, 472 U.S. 846 (1985).

The entire statutory scheme for "Exclusion" was separate and distinct from "Deportation".

Presently, all aliens are placed in Removal proceedings, with the exception not relevant here, of aliens subject to expedited removal.

It is the ***central*** position of the Petitioner that once the officer makes the determination that the alien is not subject to expedited removal because as here, the applicant is a Resident, and places the alien into Removal proceedings, that alien has

the ***same*** liberty interest and the ***same*** constitutional protections as all other all aliens in Removal proceedings.

Indeed the custody statute, INA 236, ***presumes*** that arriving aliens will be subject to the same custody restrictions as aliens already present.

> 8 USC 1226 (c)
> DETENTION OF CRIMINAL ALIENS
> (1) The Attorney General shall take into custody any alien who
> *(A) is inadmissible by reason of having committed any offense covered in section 212 (a) (2),*
> (B) is deportable by reason of having committed any offense covered in section 237 (a) (2) (A) (ii), (A)…

Here, the very statute that covers the detention of aliens clearly contemplates the detention of INADMISSIBLE Aliens.

On is only inadmissible by virtue of attempting to enter the country – just like the Respondent.

It is our position then, that ***all*** aliens in Removal proceedings have coterminous rights and procedures.

If the position of the Government is adopted then Removal proceedings are simply a semantic nicety and the old distinction between Exclusion and Deportation remains in place.

This is an irrational interpretation; Congress clearly included this dramatic procedural change for a specific reason.

In statutory interpretation it is the duty of a court to give effect to every word and clause of a statute rather than to emasculate an entire section. U.S. v. Menasche, 348 U.S. 528, 539, Bresgal v. Brock, 843 F.2d 1193, 1166 (9th Cir.1987).

Another principle of statutory construction is to presume that a statutory scheme is harmonious and that the drafters, in including and excluding language, had a definite and demonstrable purpose in mind.

An instructive case to view these changes is Lin v. INS, 298 F.3d. 832 (9th Cir. 2002) which construed a different statute - 8 USC 1231 (a) (6) - but the analysis turned on the supposed vital distinction between "arriving" aliens and aliens present in the United States.

8 USC 1231 et esq., deals with the custodial status of aliens already removed and deported from the United States but who are still in custody.

In Lin the INS argued, just as they will here, that an "arriving" alien in Removal proceedings should be treated precisely the same as an alien in former Exclusion proceedings.

> "In its brief the Government argues that the central operating terms of the two statutes are functionally the same - namely that Government suggests that "entry" and "admission" are interchangeable with "excludable" and "inadmissible." This suggestion however, fails to acknowledge the extent to which IIRAIRA has altered the statutory landscape of immigration law.'
>
> The INA is no longer denominated in terms of "entry" and "exclusion." Section 1001 (a) (13) which formerly defined "entry" as any coming of a an alien into the United States from a foreign port or place...8 USC now defines "admission" to mean the lawful entry of an alien into the United states after inspection and authorization by an immigration officer...Concomitantly, IIRAIRA dropped the concept of "excludability" and now uses the defined term of inadmissibility.....there are substantial differences between the two statutes. Under the pre-IIRARA INA, excludable aliens were entitled to less procedural protections than "deportable" aliens but once an alien effected entry into the

> United States, whether lawful or unlawful, that individual would receive the procedural protections of a deportation hearing as opposed to an exclusion hearing. Landon v. Placencia 459 U.S. 21 (1994)… We simply cannot ignore that excludable is no longer a term that has any statutory import under the INA. Lin v. INS at 856.

In that case the Ninth ultimately held that Lin, an arriving alien, who had never attained Residency, was entitled to a post-removal custody review.

The position of the Petitioner is considerably stronger. He is a Lawful Resident of the United States since 1969 and, prior to the IJ denial, he was an applicant for Citizenship.

As the Pennsylvania District court in Alaka stated in comparing a Lawful Resident present in the United States and in Removal proceedings and an "arriving alien" Lawful Resident in Removal proceedings -

> "Both are entitled to a bond hearing regardless of how they came to be placed in regular removal proceedings. There is no rationale for an alien in regular removal proceedings to be entitled to bond when the ground for removal is deportability but denied Bond when the ground of Removal is inadmissibility. As previously explained, once an alien is in Removal proceedings the distinction between deportation and exclusion is no longer cognizable under the Act…… The detention of Lawful Permanent Resident arriving aliens after they have been found subject to removal but who have not yet been ordered removed because they are pursuing their administrative remedies violates their due process rights unless they have been afforded the opportunity for an individualized hearing at which they can show they do not pose a flight risk or a danger to the community, Alaka at 570-571 .

Here, if the alien had been apprehended within the borders of the United States, he would have been eligible for an

individualized Bond hearing. We argue that the Petitioner is similarly entitled.

Based on the foregoing, the Petitioner is entitled to an individualized Bond hearing with all deliberate speed.

III. ASSUMING *ARGUMENDO*, THE INS DISTINCTION IS CORRECT, IT VIOLATES THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION

There is little doubt that when the Immigration Service distinguishes between groups of aliens, the minimal scrutiny test is employed.

Under this test, the distinction must be only rationally related to a legitimate government interest. Clebourne v. Cleveland Living Center Inc. 473, U.S. 432, 440 (1985)

Therefore, federal classifications between groups of aliens are presumptively valid unless wholly irrational. Nyquist v. Mauclet, 432 U.S. 1, 7 (1977); Sudomir v. McMahon, 767 F.2d. 156, 1464 (9th Cir. 1985); U.S. v. Baratas-Guillen 632 F.2d. 749 (9th Cir. 1980).

There is no equal protection violation where the distinction between the classes is not arbitrary or unreasonable. Komarenko v. INS, 35 F.3d 432, 435 (9th Cir. 1994).

Consequently it is exceedingly rare that this court or other federal courts have upheld an equal protection challenge under this analysis.

However, "deference is not abdication" and the federal courts have not hesitated to find an equal protection violation where the distinction is completely arbitrary and irrational and serves no legitimate governmental purpose.

The most recent example of an equal protection violation was in Garberding v. INS, 30 F.3d 1187(9th Cir.1994)

There, the prevailing policy of the INS and the BIA was that an expungement of a first time simple possession controlled substance conviction would be honored and thus not be able to support a charge of deportability, only if the states's statutory scheme was an exact counterpoint to the Federal First Offender Statute.

This distinction did not pass constitutional muster.

> "Gaberding had the bad luck or poor judgment to possess her marijuana in Montana. The state legislature of Montana has seen fit to extend the privilege of expungement to persons who are convicted of drug offenses more serious than Gaberdings simple first possession. It is this fortuitous circumstance, not Gaberdings conduct, which the INS used to distinguish her deportation." at 1191.

Petitioner contends that the present statutory scheme is equally irrational and there is ample precedent for the inescapable conclusion that this distinction is flatly unconstitutional.

Here, the INS is bound by the transitional Period Custody Rules, but they cling, with almost feral tenacity, to the argument that they do not apply to Arriving aliens. 8 C.F.R, 3.19 (h) (2) (i) (B).

Here, for purposes of Equal Protection, the two classes being distinguished are ***Residents*** present in the United States who were apprehended in the United States and are eligible for Bond under the Transitional Period Custody Rules and in Removal Proceedings and ***Residents*** apprehended at entry and in Removal proceedings and otherwise eligible for Bond under the Transitional Period Custody Rules.

The former are entitled to an individualized bond hearing and the latter are not.

This is so despite the fact that the former may have committed egregious, violent and fairly recent crimes while the latter, like here, has a distant conviction.

Simply put, this cannot pass the minimal scrutiny test.

It is argued that this distinction is particularly irrational, in this case, where the detained alien is clearly not a flight risk and is clearly not a danger to the community given that he has lived a law abiding life since *1979*.

The Equal Protection analysis, as applied to this Petitioner demonstrates an utterly irrational distinction and this Court should set a bond hearing on this ground alone.

PRAYER FOR RELIEF

It is respectfully requested that this court make a finding that Petitioner was denied Due Process of law and the Equal Protection of the law and remand this case for an Individualized Bond hearing as well as to schedule a full-blown evidentiary hearing where Petitioner will have the opportunity to present evidence and testimony in support of his Motion to Terminate proceedings in order to proceed on his application for United States Citizenship.

Dated: 5 25 2004

Frank P. Sprouls

LAW OFICE OF RICCI&SPROULS
Attorneys at Law
445 Washington Street
San Francisco, CA, 94111
(415) 391 2100
FRANK P. SPROULS
Attorney for Defendant

VERIFICATION

I, Frank P. Sprouls, hereby declare as follows:

I am an attorney admitted to practice law before the courts of the State of California, the Northern District of the United States District Court, the Southern District of the United States District Court, the Ninth Circuit Court of Appeals and the Eleventh Circuit Court of Appeals. I am also currently seeking *pro hac vice* admission to this Court.

I have my office in San Francisco, Ca, 445 Washington Street.

I am the attorney representing petitioner, who is challenging the validity of his custodial status through a petition for a writ of habeas corpus.

I am authorized to file this petition.

I have read the foregoing petition for a writ of habeas corpus and know the contents thereof to be true based upon information and belief.

I declare under the penalty of perjury that the foregoing is true and correct.

Executed on 5-9-15 2004 at San Francisco, California

Frank P. Sprouls

EXHIBIT F

JKM

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Ismael Alfaro, Petitioner, vs. Alberto R. Gonzales, et al., Respondents.	No. CV 04-1115-PHX-FJM **TRANSFER ORDER**

Pending before the Court are Petitioner's Motions to Reconsider Dismissal of Due Process Claim (Docs. #18 & #22), Motion for Hearing (Doc. #25) and Motions to Transfer (Docs. #28 & #29). Petitioner's Motions to Reconsider and Motions to Transfer will be granted and this action will be transferred to the United States Court of Appeals for the Ninth Circuit pursuant to the REAL ID Act of 2005.

BACKGROUND

On June 1, 2004, Petitioner, who is represented by counsel, filed a Petition for Writ of Habeas Corpus (Doc. #1). Petitioner presented two claims for relief: (1) that the immigration judge denied his due process rights by failing to "meaningfully address" his motion to terminate the removal proceedings in order to allow him to proceed on his application for naturalization; and (2) that the immigration judge improperly found him ineligible for release on bond as an arriving alien. On July 16, 2004, the Court dismissed

Petitioner's due process claim without prejudice for failure to exhaust administrative remedies. (Doc. #6 at 3). The Court directed Respondents to answer Petitioner's second claim and the matter was referred to Magistrate Judge Charles R. Pyle for a report and recommendation. On August 18, 2004, Respondents filed a Response in Opposition to Petition for Writ of Habeas Corpus (Doc. #9) addressing only Petitioner's bond claim as directed. On August 26, 2004, Petitioner filed a Response to Government Opposition to Petition for Writ of Habeas Corpus (Doc. #11) also addressing only the bond claim. On December 21, 2004, the magistrate judge issued a Report and Recommendation (Doc. #20) on Petitioner's bond claim.

On January 6, 2005, the Court granted a Stay of Removal (Doc. #24) prohibiting Respondents from removing Petitioner from the United States until his Petition for Writ of Habeas Corpus is resolved. On February 20, 2005, the Court entered an Order (Doc. #26) adopting the magistrate judge's Report and Recommendation and denied the Petition for Writ of Habeas Corpus on Petitioner's bond claim only. The Court, however, withheld entering judgment on the action pending resolution of Petitioner's motions for reconsideration of the July 16, 2004 Order dismissing his due process claim.

MOTIONS TO RECONSIDER

In his Motion to Reconsider Dismissal of Due Process Component of Claim (Doc. #18) and his Renewed Motion to Reconsider Dismissal of Due Process Claim (Doc. #22), Petitioner argues that his due process claim should be reinstated since he exhausted his administrative remedies subsequent to the filing of this action. Although the Court directed Respondents to file a response to Petitioner's Motion to Reconsider (see Doc. #23 at 3), they have not responded. Petitioner avers that his administrative remedies were exhausted on September 3, 2004, when the Board of Immigration Appeals dismissed his appeal. It therefore appears that Petitioner's administrative remedies have been exhausted. It also appears that Respondents have no objection to the reinstatement of Petitioner's due process claims. Accordingly, Petitioner's motions for reconsideration will be granted and his due process claim will be reinstated.

MOTIONS TO TRANSFER

Petitioner has filed a Motion to Transfer (Doc. #28) and a Renewed Motion to Transfer (Doc. #29). Petitioner argues that the Court's jurisdiction over this matter has been eliminated by the enactment of the REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 (May 11, 2005). Petitioner requests that this action be transferred to the United States Court of Appeals for the Ninth Circuit pursuant to REAL ID Act § 106(c). Respondents have not responded to the motions to transfer.

As amended by the REAL ID Act, 8 U.S.C. § 1252(a)(5) now provides in relevant part:

> (5) EXCLUSIVE MEANS OF REVIEW. – Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, United States Code, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this Act, except as provided in subsection (e).

REAL ID Act §106(a)(1)(B). By this amendment, Congress has deprived this Court of habeas corpus jurisdiction to review an order of removal entered under the Immigration and Nationality Act. Moreover, REAL ID Act § 106(b) provides that § 106(a) of the Act is retroactive: "subsection (a) shall take effect upon the date of enactment of this division and shall apply to cases in which the final administrative order of removal, deportation, or exclusion was issued before, on, or after the date of enactment." REAL ID Act § 106(b). Because Petitioner's due process claim challenges a final order of removal, this Court no longer has jurisdiction over this action. However, the lack of jurisdiction in this Court, does not necessarily mean that Petitioner is without a remedy.

In addition to stripping the district courts of jurisdiction to review orders of removal, the REAL ID Act also "restored judicial review of constitutional claims and questions of law presented in petitions for review of final removal orders" in the courts of appeals. Fernandez-Ruiz v. Gonzales, 410 F.3d 585, 587 (9th Cir. 2005). Under the prior version of 8 U.S.C. § 1252(a)(2)(C), the courts of appeals were deprived of jurisdiction to review removal orders entered against certain criminal aliens. But REAL ID Act § 106(a)(1)(A)(iii)

restored jurisdiction in the courts of appeals to review removal orders entered against criminal aliens:

> (D) JUDICIAL REVIEW OF CERTAIN LEGAL CLAIMS. – Nothing in subparagraph (B) or (C), or in any other provision of this Act (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

REAL ID Act §106(a)(1)(A)(iii); Fernandez-Ruiz, 410 F.3d at 587. Additionally, REAL ID Act § 106(c) provides that if any § 2241 habeas corpus case "challenging a final administrative order of removal . . . is pending in a district court on the date of enactment, then the district court shall transfer the case . . . to the [appropriate] court of appeals." REAL ID Act §106(c). Accordingly, Petitioner's unopposed motions to transfer will be granted and this action will be transferred to the United States Court of Appeals for the Ninth Circuit.

IT IS THEREFORE ORDERED Petitioner's Motion to Reconsider Dismissal of Due Process Component of Claim (Doc. #18) and Renewed Motion to Reconsider Dismissal of Due Process Claim (Doc. #22) are **granted**. Petitioner's due process claim is reinstated. Petitioner's Motion for Hearing (Doc. #25) is **denied** as moot.

IT IS FURTHER ORDERED that Petitioner's Motion to Transfer (Doc. #28) and Renewed Motion to Transfer (Doc. #29) are **granted** and the Petition and this action shall be **transferred as a petition for review** to the United States Court of Appeals for the Ninth Circuit pursuant to section 106(c) of the REAL ID Act of 2005. The Clerk of Court shall transfer this action forthwith.

IT IS FURTHER ORDERED that the Stay of Removal (Doc. #24) shall remain in effect pending further order of the United States Court of Appeals for the Ninth Circuit.

DATED this 19th day of August, 2005.

Frederick J. Martone

Frederick J. Martone
United States District Judge

EXHIBIT G

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

MAR 28 2007

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

ISMAEL ALFARO ALFARO, Petitioner, v. ALBERTO R. GONZALES, Attorney General, Respondent.	No. 05-75141 Agency No. A19-168-626 ORDER

Before: HUG, W. FLETCHER, and BEA, Circuit Judges.

The parties have indicated that they are agreeable to mediation of this case. We encouraged mediation owing to the especially troubling circumstances involved. Mr. Alfaro-Alfaro has been a lawful permanent resident of this country since 1969. In 1979 he was convicted of forcible rape, and served his time for that criminal offense. Since that time, he appears to have led a decent and productive life. After his release from prison, Mr. Alfaro-Alfaro was not deported, but rather allowed to establish a life in this country. He married, had two citizen children now of high school and college age. Letters from his employer, pastor, and neighbors attest to his character and indicate he has held steady employment.

Mr. Alfaro-Alfaro was not detained or ordered deported upon his return from five other previous short trips to Mexico. However, in 2003, he was detained upon his return from a brief trip to Mexico, and since that time he has been imprisoned improperly under 8 U.S.C. § 1226(c) for over three years without bond in an Arizona facility, despite the fact that his family resides in California.

During his appearance before the Immigration Judge for the motion to terminate determination, Mr. Alfaro-Alfaro's attorney was not present, but rather had sent a local substitute counsel. Local counsel did not even realize the motion to terminate determination was to be made that day, and had not arranged for Mr. Alfaro-Alfaro or other live witnesses to testify. The presence of other live witnesses could well have affected the Immigration Judge's discretionary decision not to terminate removal proceedings to allow Mr. Alfaro-Alfaro to proceed with his application for naturalization, for which he is eligible. Instead, the Immigration Judge denied the motion to terminate at that time. This unusual fact situation should be considered in the exercise of prosecutorial discretion or other relief, including petitioner's release on bond. If at commencement of mediation Mr. Alfaro-Alfaro is still detained, given the length of his questionable detention, the first topic of discussion should be to make arrangements for Mr. Alfaro-Alfaro's release from custody.

We defer submission of this case pending the results of mediation.

EXHIBIT H

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ISMAEL ALFARO ALFARO, Petitioner/Appellant, v. ALBERTO R. GONZALES, et al., Respondents/Appellees.	C.A. No. 05-75141 D.Ct. No. 04-1115-PHX-FJM **STIPULATED MOTION FOR LIMITED REMAND**

Petitioner-Appellant, Ismael Alfaro-Alfaro, and Respondent-Appellees, Alberto Gonzales, et. al., ("the government"), stipulate to remand the case to the BIA under the following conditions:

Petitioner and the government agree to remand this case to the BIA for the limited purpose of reopening the proceedings to allow Petitioner-Appellant to have a hearing before an Immigration Judge in which he may renew his Motion to Terminate proceedings to allow him to apply for Naturalization. The Petitioner-Appellant and the government agree that under the terms of this limited remand, no other issues will be considered. Each party will bear its own costs and fees.

The government agrees that upon reopening of the proceedings, it will stipulate to a change of venue to San Francisco, California, where the hearing will take place.

Petitioner was released from custody on June 13, 2007. The government agrees that it will not attempt to remove Petitioner from the United States until after a final order is issued on the Motion to Terminate, if it is denied.

Respectfully submitted this _____ day of June, 2007.

DANIEL G. KNAUSS
United States Attorney
District of Arizona
JOHN BOYLE
Chief, Appellate Section

FRANK P. SPROULS
Attorney for Petitioner
Law Office of Ricci and Sprouls
445 Washington Street
San Francisco, California 94111

CYNTHIA M. PARSONS
Assistant U.S. Attorney
40 North Central Avenue, Suite 1200
Phoenix, Arizona 85004-4408
Telephone: (602) 514-7500
Attorneys for Respondent/Appellees

EXHIBIT I

LAW OFFICE OF RICCI & SPROULS
Attorney at Law
445 Washington Street
San Francisco, CA 94111
(415) 391 2100
FRANK P. SPROULS
Attorney for Respondent

IMMIGRATION AND NATURALIZATION SERVICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE
SAN FRANCISCO, CALIFORNIA

MAY: 1, 08
Time: 1:00 a.m.
Judge: HON. BHS

Respondent
Ismael Alfaro

A19 168 626

_____/

Procedural History/Overview of the Issues/Renewed Motion to Terminate (to be filed under separate cover)

The Respondent is an "arriving alien" in proceedings brought on January 12, 2004 in Eloy, AZ. (Exhibit A)

His former counsel filed a Motion to Terminate proceedings based on his prima facie eligibility for Naturalization. (Exhibit B)

The matter was set for Master Hearing and the Petitioner's counsel Steve Coughlin, who resides in San Francisco, instructed local counsel to appear for him and to simply set a date for a hearing where the Motion to

terminate would be meaningfully addressed.

In addition to his own testimony, Respondent contemplated that his Lawful permanent Resident wife would testify as well as his United States citizen children.

Instead, counsel was told simply that the Motion was denied - no hearing, no explanation and no meaningful appeal record. (Exhibit C)

The transcript reveals that there was no hearing at all on the Motion to Terminate. (Exhibit C)

Indeed, there is not even an on-the-record colloquy between the parties as to the relative merits of the Motion.

In the decision the Immigration Judge simply states that, "having considered all of the evidence before it, is denying the Motion to Terminate." (Exhibit D)

The Respondent, through current counsel, then filed a Writ of Habeas Corpus in the Phoenix District Court. (Exhibit E)

Respondent made two separate claims, one, (not relevant here) was that he was unconstitutionally deprived of his liberty by virtue of his being held in Mandatory Custody as an arriving alien and secondly, that he was denied due process of law when the Immigration Judge failed to conduct a hearing or meaningfully consider any evidence pursuant to the

Petitioner's Motion to Terminate Removal proceedings to apply for United States Citizenship.

I. PETITIONER WAS DENIED DUE PROCESS OF LAW BY THE IJ IN ELOY, AZ

It is one of the anomalies of Immigration law that one can be eligible for citizenship on the one hand and ineligible for any relief on the other.

The only avenue for relief for a long time Resident is found at INA 240A (a) which requires seven years residency, however, the alien must "not have been convicted of an aggravated felony."

Next, while it is true that he committed the offense **twenty-one years** before the effective date of IIRAIRA, the law is retroactively applied.

This is so because while it is true that the Supreme Court has held that IIRAIRA cannot be apply retroactively to an alien who **pleads** guilty prior to the effective date of the Act, it does not apply to an alien like Respondent who proceeded to a jury trial. Armendiaz-Montaya v. Sonchik, 291 F.3d. 1116, 1121-1122 (9th Cir. 2002)

It was thus clear that the Petitioner's only avenue for relief was the Motion to terminate proceedings and he was denied due process in the Immigration Judge's refusal to even ***conduct*** a hearing or explain or justify his summary

denial.

A. Legal standard for the denial of due process

It has been unambiguously held that aliens in deportation proceedings are entitled to both substantive and procedural due process right under our constitution. Reno v. Flores, 507 U.S. 292, 306 (1993). "It is well established that the Fifth Amendment entitles aliens to due process of law in deportation hearings."

It has also been held that the due process is offended where the Immigration Service, ignores its own precedent and ignores specific statutory grounds. Brownell v. We Shung 352 U.S. 180 (1956); Kwong Hai Chew v. Colding, 344 U.S. 590, 596 (1953).

Next, in the specific context of a Deportation/Removal hearing, due process demands that an alien facing deportation is entitled to a full and fair hearing of his claims and a reasonable opportunity to present evidence on his behalf. Sanchez v. INS, 164 F.3d. 448, 450 (9th Cir. 1990); Colemenar v. INS 210 F. 3d. 967, 975 (9th Cir. 200)

In the particular case, it was piercingly obvious that the Respondent was denied due process in the sense that he received ***no hearing at all*** and he had **no opportunity** to present evidence on his behalf.

Next, it was abundantly clear that the Petitioner had a right to **meaningful** administrative review to the Board of Immigration Appeals.

However, it was argued that that Respondent had been denied the right to meaningful appellate review because both counsel and the BIA are left to speculate as to ***why*** the Motion was denied.

Was it because, the IJ felt that the crime was so heinous that the intervening 25 years of law abidance did not purge the taint?

Was it because Petitioner had not presented sufficient hardship to his Lawful Resident wife and United States citizen children?

Was it because he did not credit the letters of support from his priest, his employer and his friends and neighbors?

II. **REAL ID was enacted and the case was transferred to the 9th Circuit and they agreed that a denial of due process had been found.**

REAL ID was enacted while this issue was still under consideration before the District Court.

Real ID disvested the District Court of habeas jurisdiction and the matter was transferred to the 9th Circuit. (Exhibit F)

The 9th Circuit found that a denial of due process existed and the matter was remanded with specific instruction to conduct a thoroughgoing and meaningful evidentiary hearing on the Motion to Terminate. (Exhibit G)

Next, the parties agreed to a stipulated remand that held that the Petitioner was entitled to a hearing on the Motion to Terminate. (Exhibit H)

III. **THE GOVERNMENT HAS NOT CONCEDED THAT THE MATTER HAS MERIT; HOWEVER, THEY HAVE EXPLICITLY CONCEDED PRIMA FACIE ELIGIBILITY**

The procedure to terminate proceedings is explicitly authorized by the regulations and allows an Immigration Judge to terminate proceedings under 8 C.F.R. 239.2 (f) which specifically allows the IJ to:

> "terminate removal proceedings to permit the respondent to proceed to a final hearing on a pending application or petition for naturalization, when he/she has established prima facie eligibility for naturalization and the matter involves exceptionally appealing or humanitarian factors."

Next, in terms of prima face eligibility, it is undisputed that, in terms of 101 (a) (f) (8,) and the applicability of an aggravated felony serving as a permanent bat to a bar to finding good moral character, prior to IMMACT90, the only bar to a finding of good moral character was a conviction for murder.

However, IMMACT90 specifically addressed the effective date of aggravated felonies in terms of the bar to a finding of good moral character under 101 (a)(f)(8) and held that this bar only applies to convictions on or after the effective date - November 29, 1990.

The Ninth Circuit has definitely checked in and held that the aggravated felonies added by IIRAIRA, in terms of good moral character, still have an effective date of November 29, 1990. Hernandez de Anderson v. Mukasey, 497 F.3d. 927 (9th Cir. 2007);Lopez-Castellanos v. Gonzalez 437 F.3D. 848, 851 (9th Cir. 2006)

Now, there is a highly technical component to the prima face finding when an alien is in proceedings - the Government must affirmatively communicate to the Judge that the Respondent is prima facie eligible or the alien needs to obtain a Declaratory Judgment from a District Court. De Hernandez, supra at 933, quoting Matter of Cruz, 15 I& N Dec. 236 (BIA 1975).

Now, in the instant case, it is not a reasonable or intellectually responsible argument to claim that he is **not** prima facie eligible insofar one is not statutorily precluded from demonstrating good moral character in the context of Citizenship if the conviction occurred before 1990 where, as here, the alien was convicted in ***1979*** - eleven years before

the cut-off.

However, it is argued that the Government has affirmatively communicated prima face eligibility for relief in the sense that the US Attorney stipulated and agreed to have the case remanded for an Evidentiary hearing on the Motion to Terminate.

CONCLUSION

Based on the above procedural history this matter must proceed to a full hearing on a Motion to Terminate proceedings to apply for Citizenship.

We will file an updated Motion with new evidence under separate cover.

Dated; 3-18 2008

Frank P. Sprouls

EXHIBIT J

RONALD E. LE FEVRE
Chief Counsel
LESLIE UNGERMAN
Deputy Chief Counsel
JAMES B. GILDEA
Assistant Chief Counsel
U.S. Department of Homeland Security
Bureau of Immigration and Customs Enforcement
Office of the Chief Counsel
120 Montgomery Street, Suite 200
San Francisco, CA 94104
Phone: (415) 705-4613

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT, SAN FRANCISCO, CALIFORNIA

In the Matter of	
	A 19-168-626
ALFARA, Ismael,	
	GOVERNMENT'S OPPOSITION TO MOTION TO TERMINATE
Respondent	
	Honorable Brian H. Simpson
In Removal Proceedings	Master hearing 5/1/08, 1:00 p.m.

This matter was remanded because respondent did not present evidence of what "exceptionally appealing or humanitarian factors" may pertain in his case, if any, at his initial merits hearings. See Attachment "A." The remand assumes that respondent will renew his motion to terminate, which he has. Respondent has presented the evidence concerning what he asserts are exceptionally appealing or humanitarian factors. When the record is complete in this regard, the matter can return to the appeal process.

However, the IJ is without authority to grant respondent's motion to terminate these proceedings based on the pendency of respondent's application for naturalization. The IJ can only do so where the DHS has communicated, affirmatively, a finding that respondent has established prima facie eligibility for naturalization. See In re Acosta Hildago, 24 I&N Dec. 103 (BIA 2007); Matter of Cruz, 15 I&N Dec. 236 (BIA 1975). The DHS does not so communicate, and views respondent as ineligible based on his very serious felony criminal conviction.

Respondent's motion to terminate should be denied.

Dated: April 1, 2008

Respectfully Submitted

JAMES B. GILDEA
Assistant Chief Counsel

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA

PATRICIA M. VROOM
CHIEF COUNSEL

DETAINED

By: Robert C. Bartlemay Sr.
Assistant Chief Counsel
Department of Homeland Security
2035 North Central Avenue
Phoenix, Arizona 85004

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA

IN THE MATTER OF	)	
	)	
Ismael ALFARO-ALFARO	)	
	)	IN REMANDED REMOVAL PROCEEDINGS
A19-168-626	)	
	)	
Phoenix, Arizona	)	
	)	

DEPARTMENT OF HOMELAND SECURITY'S
MOTION FOR REMAND TO THE IMMIGRATION COURT

Attachment "A"

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA

IN THE MATTER OF	)	
	)	
Ismael ALFARO-ALFARO	)	
	)	IN REMANDED REMOVAL PROCEEDINGS
A19-168-626	)	
	)	
Phoenix, Arizona	)	
	)	

DEPARTMENT OF HOMELAND SECURITY'S
MOTION FOR REMAND TO THE IMMIGRATION COURT

Pursuant to the parties' Stipulated Motion for Limited Remand, the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") remanded the foregoing case to the Board of Immigration Appeals ("Board" or "BIA") on August 29, 2007. The Department of Homeland Security ("the Department") hereby requests further remand to the immigration court.

STATEMENT OF THE CASE

Respondent is a 54-year-old male, native and citizen of Mexico. (Tr. at 17-8 and 29.) On February 20, 1969, Respondent was granted lawful permanent resident status in the United States. (Tr. at 17-8.) On August 3, 1979, Respondent was convicted in Superior Court, State of California, Los Angeles County, for the offense of "Forcible Rape," a felony, in violation of California Penal Code sections 261(2) and 264. (Exh. 3.) He was sentenced to five years imprisonment. (*Id.*) On December 15, 2003, Respondent applied for admission at the Oakland International Airport. (*Id.*) He was paroled into the

United States for deferred inspection that same date. On January 12, 2004, Respondent's parole was revoked. (*Id.*)

The Department issued a Notice to Appear (NTA) on January 12, 2004. (Exh.1.) The Notice to Appear listed Respondent's alienage and conviction, and charged Respondent with removability under sections 212(a)(2)(A)(i)(I), alien convicted of a crime involving moral turpitude. (*Id.*) On February 27, 2004, Respondent moved to terminate the proceedings under 8 C.F.R. § 239.2(f)[1] because he has an application for naturalization pending. (Exh. 2.) On March 5, 2004, the Department opposed the motion to terminate. (Exh. 4.) In resumed removal proceedings on March 24, 2004, Respondent admitted all allegations on the NTA; and he conceded the charge of removability. (Tr. at 17-8.) The immigration court then sustained the charge. (*Id.*)

In resumed removal proceedings on April 15, 2004, the immigration court denied the motion to terminate the proceedings to allow the application for naturalization to be adjudicated. (Oral Decision of the Immigration Judge, at 3.) The immigration court found that the respondent was not eligible for any forms of relief and ordered him removed to Mexico. (Oral Decision of the Immigration Judge, at 3-4.) Respondent reserved appeal. Respondent's appeal was dismissed on September 3, 2004. The Board stated that although the Department had communicated through its opposition to the motion to terminate Respondent's eligibility for naturalization, the immigration court properly denied the motion as a matter of discretion. The Respondent thereafter filed a petition for review with the U.S. Ninth Circuit Court of Appeals. The parties sought a stipulated motion for remand to the Board. The parties' agreement stated the case should be further remanded to the immigration court to allow the Respondent to renew his

[1] 8 C.F.R. § 239.2(f) has been replaced by 8 C.F.R. § 1239.2(f). The new section is identical to the previous section.

motion to terminate. The parties also agreed to change venue in the matter to San Francisco, California for the hearing. In keeping with the above referenced agreement, the Department requests the case be remanded to the immigration court for the said hearing.

STATEMENT OF THE FACTS

Respondent is a 54-year-old male, native and citizen of Mexico. (Tr. At 17-8 and 29.) On February 20, 1969, Respondent was granted lawful permanent resident status in the United States. (Tr. at 17-8.) On August 3, 1979, Respondent was convicted in Superior Court, State of California, Los Angeles County, for the offense of Forcible Rape, a felony, in violation of California Penal Code sections 261(2) and 264. He was sentenced to five years imprisonment. (Exh. 3.) On December 15, 2003, Respondent applied for admission at the Oakland International Airport. (*Id.*) He was paroled into the United States for deferred inspection that same date. On January 12, 2004, Respondent's parole was revoked. (*Id.*) On February 27, 2004, Respondent moved to terminate the proceedings under 8 C.F.R. § 239.2(f) because he has an application for naturalization pending. (Exh. 2.) On March 5, 2004, the Department opposed the motion to terminate. (Exh. 4.)

In resumed removal proceedings on April 15, 2004, the immigration court denied the motion to terminate the proceedings to allow the application for naturalization to be adjudicated. (Oral Decision of the Immigration Judge, at 3.) The immigration court found that Respondent was not eligible for any forms of relief and ordered him removed to Mexico. (Oral Decision of the Immigration Judge, at 3-4.)

LEGAL ARGUMENT

The immigration court may terminate removal proceedings to permit Respondent "to proceed to a final hearing on a pending application or petition for naturalization when

the alien has established prima facie eligibility for naturalization and the matter involves exceptionally appealing or humanitarian factors." *See* 8 C.F.R. § 1239.2(f). In the case of *In re Acosta Hildago*, 24 I&N Dec. 103 (BIA 2007), the Board upheld its decision in *Matter of Cruz*, 15 I&N Dec. 236 (BIA 1975) that the Board and the immigration court is without jurisdiction to determine an alien's eligibility for naturalization and require some form of affirmative communication from the Department as to whether the alien has established prima facie eligibility for naturalization. (*Id.* at 105-6.)

In denying the motion to terminate the proceedings, the immigration court did not conduct a hearing to determine what "exceptionally appealing or humanitarian factors" were present in Respondent's case. The immigration court should have allowed Respondent the opportunity to present evidence on this issue. Remand is appropriate for the limited purpose of allowing Respondent to renew his motion to terminate and present such evidence if it exists.

CONCLUSION

For the foregoing reasons, the Department of Homeland Security's Motion for Remand to the immigration court should be GRANTED.

Respectfully submitted this 26th day of October, 2007

PATRICIA M. VROOM
CHIEF COUNSEL

_____
Robert C. Bartlemay Sr.
Assistant Chief Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT ONE (1) COPY OF THE ATTACHED DEPARTMENT OF HOMELAND SECURITY'S MOTION FOR REMAND TO THE IMMIGRATION COURT WAS SERVED UPON Respondent (or his representative) by placing it in a sealed envelope, via either U.S. Postal Service Mail or Inter Office Mail at 1705 Hanna Road, Eloy, Arizona, 85231, addressed as follows:

Frank P. Sprouls, Esq.
Ricci & Sprouls PC
445 Washington Street
San Francisco, CA 94111

Robert C. Bartlemay Sr.
Assistant Chief Counsel
Eloy, Arizona

April 1, 2008 Deleted: October 26, 2007

CERTIFICATE OF SERVICE

The undersigned hereby declares as follows:

I am a citizen of the United States over the age of 18 years and not a party to the captioned action. My business address is 120 Montgomery Street, Suite 200, San Francisco, California 94104.

"GOVERNMENT'S OPPOSITION"

I served a true and correct copy of the foregoing document by placing said copy in the U.S. mail on this date, postage prepaid, addressed as follows.

Frank P. Sprouls, Esq.
445 Washington Street
San Francisco, California 94111

Dated: April 1, 2008
San Francisco, California

JAMES B. GILDEA
Assistant Chief Counsel
Department of Homeland Security

EXHIBIT K

File

LAW OFFICE OF RICCI & SPROULS
Attorney at Law
445 Washington Street
San Francisco, CA 94111
(415) 391 2100
FRANK P. SPROULS
Attorney for Respondent

IMMIGRATION AND NATURALIZATION SERVICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE
SAN FRANCISCO, CALIFORNIA

MAY: 1, 08
Time: 1:00 a.m.
Judge: HON. BHS

Respondent
Ismael Alfaro

A19 168 626

_____/

RESPONSE TO GOVERNMENT OPPOSITION TO MOTION TO TERMINATE TO APPLY FOR CITIZENSHIP

First, the Government either did not read the Ninth Circuit Order or they did not understand it.

The matter was ***not*** remanded because Respondent did not present evidence of his exceptional and appealing humanitarian factors, it was remanded because he was denied due process when the IJ did not even address his incredibly compelling evidence of exceptional and appealing humanitarian factors.

Next, the Government motion betrays a fatal misapprehension of the distinction between the *a priori* concept of prima facie eligibility and the exercise of discretion.

This procedure herein is authorized by the regulations and allows an Immigration Judge to terminate proceedings under 8 C.F.R. 239.2 (f) which specifically allows the IJ to:

"terminate removal proceedings to permit the respondent to proceed to a final hearing on a pending application or petition for naturalization, when he/she has established ***prima facie eligibility*** for naturalization and the matter involves exceptionally appealing or humanitarian factors

A useful analogy would be an alien with twelve years unlawful presence in the United States, no disqualifying convictions and a perfectly healthy, happy, well adjusted 5 year old United State citizen child.

That alien is ***prima facie*** eligible for Cancellation; however it is undisputed that the Cancellation case will be denied.

Now, in the instant case, it is not a reasonable or intellectually responsible argument to claim that he is **not** prima facie eligible insofar one is not statutorily precluded from demonstrating good moral character in the context of

Citizenship if the conviction occurred before 1990 and where, as here, the alien was convicted in ***1979*** - eleven years before the cut-off. Hernandez de Anderson v. Mukasey, 497 F.3d. 927 (9th Cir. 2007);Lopez-Castellanos v. Gonzalez 437 F.3D. 848, 851 (9th Cir. 2006)

The Government position is in direct contrast to black-letter Ninth Circuit law.

However, in this case it is argued that the Government **has** affirmatively communicated prima face eligibility for relief in the sense that the **US Attorney** stipulated and agreed to have the case remanded for an Evidentiary hearing on the Motion to Terminate.

Next, In Re Acosta Hidalgo, 24 IN Dec. 103 (BIA 2007) states that if the Government does not affirmatively agree to prima facie eligibility, the alien can simply obtain an order from a Federal Court.

Here, it is argued that a Federal Court (The Ninth Circuit) has made a specific finding that he is prima face eligible by remanding this case for a hearing on the Motion to Terminate.

However, if the District Counsel would like our office to file a Motion for a Declaratory Judgment with an Order stating, **"Good Cause appearing, the District Court hereby finds that "1979 is before 1990",** we would be happy to do so.

I can state though, that the ears of the Office of the District Counsel will be burning when the Federal Judge realizes that we have been forced to burden their calendar with such a simple and obvious and wholly unnecessary action.

Dated: 4/1 2008

Frank P. Sprouls

Style Definition: Normal: Font: 10 pt

Formatted: Bottom: 1"

PROOF OF SERVICE –

Case name: ALFIMO

A 19-168-626

I, the undersigned do hereby declare and affirm as follows;

I am employed at the law Office of Ricci Sprouls PC AT 445 WASHINGTON STREET, SAN FRANCISCO, CA and I am not a party to this action.

That on 4/1-08

I caused to be served on the following interested parties – RESPONSE TO GOV'T OPPOSITION

BY _____ FEDERAL EXPRESS MAIL
BY ✓ PERSONAL DELIVERY
BY _____ REGULAR MAIL

OFFICE OF THE DISTRICT COUNSEL
IMMIGRATION AND NATURLIZATION SERVICE
District Counsel
120 Montgomery Street – 2nd Floor
San Francisco, CA

Dated: 4/1/08

William Sprouls

EXHIBIT L

F4

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
120 MONTGOMERY ST., SUITE 800
SAN FRANCISCO, CALIFORNIA 94104

RICCI SPROULS PC
SPROULS, FRANK P.
445 WASHINGTON STREET
SAN FRANCISCO, CALIFORNIA 94111

Date: Apr 14, 2008

File A19-168-626

In the Matter of:
ALFARO-ALFARO, ISMAEL

_____ Attached is a copy of the written decision of the Immigration Judge. This decision is final unless an appeal is taken to the Board of Immigration Appeals. The enclosed copies of FORM EOIR 26, Notice of Appeal, and FORM EOIR 27, Notice of Entry as Attorney or Representative, properly executed, must be filed with the Board of Immigration Appeals on or before _____. The appeal must be accompanied by proof of paid fee ($110.00).

_____ Enclosed is a copy of the oral decision.

_____ Enclosed is a transcript of the testimony of record.

_____ You are granted until _____ to submit a brief to this office in support of your appeal.

_____ Opposing counsel is granted until _____ to submit a brief in opposition to the appeal.

✓ Enclosed is a copy of the order/decision of the Immigration Judge.

All papers filed with the Court shall be accompanied by proof of service upon opposing counsel.

Sincerely,

Immigration Court Clerk UL

cc: GILDEA, JAMES B.
120 MONTGOMERY STREET, STE 200
SAN FRANCISCO, CALIFORNIA 94104

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE OF IMMIGRATION REVIEW
IMMIGRATION COURT
SAN FRANCISCO, CALIFORNIA

In the Matter of
ALFARO-ALFARO, ISMAEL
Respondent

Case No. **A#19-168-626**

Hearing Date: May 1, 2008 (M)

ORDER OF THE IMMIGRATION JUDGE

Upon consideration of (**X**) Respondent's/Counsel's ( )Department of Homeland Security's motion to/for :

( ) Change Venue to:
( ) Motion to Advance/Re-Set to Master Calendar
( ) Extension to file documents
( ) Telephonic Appearance/Witness Testimony:
( ) Administratively Close Proceedings
(X) Dismiss/Terminate Removal/Deportation/Asylum/Exclusion Proceedings
( ) Withdraw as Attorney of Record:
( ) Reopen/Reconsider the Immigration Judge's Decision
( ) Other:

Filed in the above entitled matter, it is HEREBY ORDERED that the Motion be:

( ) GRANTED (✓) DENIED

for the reason (s) set forth below:

There is no evidence of any communication by DHS that the Respondent has established prima facie eligibility for naturalization.

Date: April 9, 2008

(For) Brian H. Simpson
Immigration Judge

EXHIBIT M

FY APR 15 2008

NOTICE OF HEARING IN REMOVAL PROCEEDINGS
IMMIGRATION COURT
120 MONTGOMERY ST., SUITE 800
SAN FRANCISCO, CALIFORNIA 94104

RE: ALFARO-ALFARO, ISMAEL
FILE: A19-168-626

DATE: Apr 14, 2008

TO: RICCI SPROULS PC
SPROULS, FRANK P.
445 WASHINGTON STREET
SAN FRANCISCO, CALIFORNIA 94111

Please take notice that the above captioned case has been scheduled for a MASTER hearing before the Immigration Court on Jul 17, 2008 at 1:00 P.M. at:

120 MONTGOMERY ST., SUITE 800, COURTROOM 5
SAN FRANCISCO, CALIFORNIA 94104

You may be represented in these proceedings, at no expense to the Government, by an attorney or other individual who is authorized and qualified to represent persons before an Immigration Court. Your hearing date has not been scheduled earlier than 10 days from the date of service of the Notice to Appear in order to permit you the opportunity to obtain an attorney or representative. If you wish to be represented, your attorney or representative must appear with you at the hearing prepared to proceed. You can request an earlier hearing in writing.

Failure to appear at your hearing except for exceptional circumstances may result in one or more of the following actions: (1) You may be taken into custody by the Department of Homeland Security and held for further action. OR (2) Your hearing may be held in your absence under section 240(b)(5) of the Immigration and Nationality Act. An order of removal will be entered against you if the Department of Homeland Security established by clear, unequivocal and convincing evidence that a) you or your attorney has been provided this notice and b) you are removable.

IF YOUR ADDRESS IS NOT LISTED ON THE NOTICE TO APPEAR, OR IF IT IS NOT CORRECT, WITHIN FIVE DAYS OF THIS NOTICE YOU MUST PROVIDE TO THE IMMIGRATION COURT SAN FRANCISCO, CA THE ATTACHED FORM EOIR-33 WITH YOUR ADDRESS AND/OR TELEPHONE NUMBER AT WHICH YOU CAN BE CONTACTED REGARDING THESE PROCEEDINGS. EVERYTIME YOU CHANGE YOUR ADDRESS AND/OR TELEPHONE NUMBER, YOU MUST INFORM THE COURT OF YOUR NEW ADDRESS AND/OR TELEPHONE NUMBER WITHIN 5 DAYS OF THE CHANGE ON THE ATTACHED FORM EOIR-33. ADDITIONAL FORMS EOIR-33 CAN BE OBTAINED FROM THE COURT WHERE YOU ARE SCHEDULED TO APPEAR. IN THE EVENT YOU ARE UNABLE TO OBTAIN A FORM EOIR-33, YOU MAY PROVIDE THE COURT IN WRITING WITH YOUR NEW ADDRESS AND/OR TELEPHONE NUMBER BUT YOU MUST CLEARLY MARK THE ENVELOPE "CHANGE OF ADDRESS." CORRESPONDENCE FROM THE COURT, INCLUDING HEARING NOTICES, WILL BE SENT TO THE MOST RECENT ADDRESS YOU HAVE PROVIDED, AND WILL BE CONSIDERED SUFFICIENT NOTICE TO YOU AND THESE PROCEEDINGS CAN GO FORWARD IN YOUR ABSENCE.

A list of free legal service providers has been given to you. For information regarding the status of your case, call toll free 1-800-898-7180 or 703-305-1662.

CERTIFICATE OF SERVICE

THIS DOCUMENT WAS SERVED BY: MAIL (M) X PERSONAL SERVICE (P)
TO: [ ] ALIEN [ ] ALIEN c/o Custodial Officer [X] ALIEN's ATT/REP [X] DHS
DATE: 4/14/08 BY: COURT STAFF [illegible] V3
Attachments: [ ] EOIR-33 [ ] EOIR-28 [ ] Legal Services List [X] Other

PROOF OF SERVICE –
Case name - Alfaro
I, William Sprouls, the undersigned do hereby declare and affirm as follows;

I am employed at the law Office of Ricci and Sprouls at 445 Washington Street, San Francisco, CA and I am not a party to this action.

That on 04/25/08

Request for Declaratory Judgement

----x-----Regular mail
___ ____E- File

--- X--- Personal Delivery To:

__x____US ATTORNEYS OFFICE
CIVIL DIVISION
150 Almaden Suite 900
San Jose, CA 95113

__
DISTRICT DIRECTOR INS
CIIZENSHIP UNIT
630 SANSOME STREET
SAN FRANCISCO, CA 94111

Dated 4/25 2008

WILLIAM SPROULS